

121 FERC ¶ 61,198
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

November 26, 2007

In Reply Refer To:
Docket Nos. RP07-39-000
RP07-39-002

Mr. Larry Jenson
Regulatory Affairs Manager
Black Marlin Pipeline Company
2800 Post Oak Boulevard
Houston, TX 77251

RE: Order on Stipulation and Settlement Agreement

Dear Mr. Jenson:

1. On July 16, 2007, Black Marlin Pipeline Company (Black Marlin) filed an offer of settlement in the form of a Stipulation and Settlement Agreement (Settlement) to resolve all of the issues in Black Marlin's general section 4 rate proceeding. The Commission's Trial Staff filed initial comments supporting the Settlement on July 23, 2007. Trial Staff states that the Settlement is the product of extensive negotiations over a lengthy period, resolves all outstanding issues in this proceeding, and is fair, reasonable, and in the public interest. No other comments were filed. On August 28, 2007, the Presiding Administrative Law Judge certified the Settlement to the Commission as an uncontested settlement.¹

2. Article I of the Settlement establishes Black Marlin's base tariff rates (Settlement Rates), as set forth on Substitute Fifteenth Revised Sheet No. 4 contained in Appendix A. These Settlement Rates were placed into effect on an interim basis as of May 1, 2007.² Section 1.3 provides that the order approving this Settlement will authorize the

¹ *Black Marlin Pipeline Company*, 120 FERC ¶ 63,011 (2007).

² On June 25, 2007, the Chief Administrative Law Judge authorized Black Marlin, in Docket No. RP07-39-000 and 002, to charge the interim rates subject to refund pending certification of the settlement and consideration by the Commission.

Settlement Rates to continue in effect for the term of this Settlement. Given that the Settlement Rates have been charged on an interim basis since May 1, 2007, section 1.5 provides that no refunds are due any of Black Marlin's shippers.

3. The Appendix A tariff rate sheet shows that Black Marlin's maximum tariff rate is \$0.90 per MMBtu, a reduction from the filed rate of \$1.0622 per MMBtu. Section 1.2 states that these Settlement Rates were determined on the basis of a negotiated "black box" cost of service. The sheet provides, however, that effective May 1, 2007, Black Marlin's transmission plant depreciation rate shall be 1.56 percent and its negative salvage rate shall be 0 percent.

4. Section 1.4 provides that the Settlement Rates are subject to a discounted interruptible transportation commodity rate of \$0.79 per MMBtu offered to Intervenor Apache Corporation and ConocoPhillips Company (and any shipper(s) of gas produced from Intervenor's reserves currently attached to Black Marlin's system) effective May 1, 2007, and terminating upon the later of (a) the termination of this Settlement at the end of its term, or (b) February 1, 2008.

5. Article II of the Settlement provides that Black Marlin will make certain corrections to its accounting books to reflect certain adjustments to Gas Plant in Service and Accumulated Provision for Depreciation and Amortization as of May 1, 2007.

6. Article III of the Settlement states that the term of the Settlement commences on the Settlement effective date as provided in Article IV, and the Settlement terminates (except for the survival of Articles II and VI) when Black Marlin's base tariff rates are modified by a superseding general rate change filing under Natural Gas Act (NGA) section 4 or by an NGA section 5 change in any of Black Marlin's base tariff rates.

7. Section 4.1 of Article IV provides that the various provisions of the Settlement are not severable and will become effective on the date the Settlement is approved by a final Commission order as to all of its terms without material modification. In the event that the Commission materially modifies the Settlement, section 4.2 provides that parties will be deemed to have accepted the modification unless, within 14 days, they file and serve a written notice that they refuse to accept the modification. On the 15th day, the Settlement will become effective and binding on parties that have accepted the Settlement as modified by the Commission.

8. In the event that the Settlement is contested, section 4.3 provides that it is the intent of the parties that the Commission approves the Settlement for all Non-Contesting Parties. Any Contesting Parties will neither be bound by, nor receive the benefits of, the Settlement, and Contesting Parties that are shippers shall pay Black Marlin's tariff rates that were accepted and made effective May 1, 2007.

9. Article V of the Settlement states approval of the Settlement constitutes any waivers necessary for the Settlement to be effectuated in accordance with all of its terms.

10. Article VI contains standard reservations stating that parties waive no rights other than as specifically provided in the Settlement and that the Settlement does not establish any principles or policies. Furthermore, Article VI states that, if the Commission considers any change to the settlement after it becomes effective, the proper standard of review would be the “public interest” standard set forth in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).³

11. The Commission finds the Settlement and the accompanying Substitute Fifteenth Revised Sheet 4 to be fair and reasonable agreement, and in the public interest. Substitute Fifteenth Revised Sheet 4 is accepted and the Settlement is approved, to become effective as proposed. The Commission’s approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

By direction of the Commission. Commissioners Kelly and Wellinghoff
dissenting in part with separate statements
attached.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³ As a general matter, parties may bind the Commission to a public interest standard. *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 960-62 (1st Cir. 1993). Under limited circumstances, such as when the agreement has broad applicability, the Commission has the discretion to decline to be so bound. *Maine Public Utilities Commission v. FERC*, 454 F.3d 278, 286-87 (D.C. Cir. 2006). In this case, we find that the public interest standard should apply.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Black Marlin Pipeline Company

Docket Nos. RP07-39-000
RP07-39-002

(Issued November 26, 2007)

KELLY, Commissioner, *dissenting in part*:

The parties to this settlement agreement request that the *Mobile-Sierra* “public interest” standard of review apply with respect to any future changes to the settlement, whether proposed by a party, a non-party or the Commission acting *sua sponte*. This settlement sets forth Black Marlin Pipeline Company’s base tariff rates.

As I explained in *Transcontinental Gas Pipe Line Corporation*,¹ I do not believe the Commission should approve a “public interest” standard of review provision, to the extent future changes are sought by a non-party or the Commission acting *sua sponte*, without an affirmative showing by the parties and a reasoned analysis by the Commission as to the appropriateness of such a provision. As I have previously noted,² this is particularly the case where, as here, the settlement agreement will impact a generally applicable tariff under which all customers take service, including any new customers that did not have the opportunity to participate in the settlement negotiations.

Accordingly, I dissent in part from this order.

Suede G. Kelly
Commissioner

¹ 117 FERC ¶ 61,232 (2006).

² *San Diego Gas & Electric Co.*, 119 FERC ¶ 61,169 (2007).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Black Marlin Pipeline Company

Docket Nos. RP07-39-000
and RP07-39-001

(Issued November 26, 2007)

WELLINGHOFF, Commissioner, dissenting in part:

The parties in this case have asked the Commission to apply the “public interest” standard of review when it considers any change to the Settlement that may be sought by the parties, a non-party, or the Commission acting *sua sponte*.

Because the facts of this case do not satisfy the standards that I identified in *Entergy Services, Inc.*,¹ I believe that it is inappropriate for the Commission to grant the parties’ request and agree to apply the “public interest” standard to future changes to the settlement sought by a non-party or the Commission acting *sua sponte*. In addition, for the reasons that I identified in *Southwestern Public Service Co.*,² I disagree with the Commission’s characterization in this order of case law on the applicability of the “public interest” standard.

For these reasons, I respectfully dissent in part.

Jon Wellinghoff
Commissioner

¹ 117 FERC ¶ 61,055 (2006).

² 117 FERC ¶ 61,149 (2006).